No. 22126

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE STATE OF CALIFORNIA, Acting by and through the DEPARTMENT OF WATER RESOURCES,

Appellant,

vs.

THE OROVILLE-WYANDOTTE IRRIGATION DISTRICT, an irrigation district, and the CALIFORNIA PUBLIC UTILITIES COMMISSION, a public commission,

Appellees.

APPELLANT'S REPLY BRIEF

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I

STATEMENT OF THE CASE

OWID offers this court, under the guise of a new statement of the case, additional facts concerning the approval of Project 2088 by various state agencies and prior negotiations between DWR and OWID (OWID 2–3). These facts and the conclusions to be drawn from them are subject to dispute. Further, and most significant, they are not relevant to the issue of who has jurisdiction to determine this matter, nor to the propriety of injunctive or declaratory relief.

By recitation of these additional facts OWID endeavors to argue the issue of liability, relying heavily on the theory of estoppel. Unfortunately, the merits of this issue are not before this court for review.

We submit that the facts relevant to the issues raised by this appeal are set forth in DWR's statement of the case and are undisputed.

II

ARGUMENT

A. Summary

OWID and CPUC characterize this dispute as one in the nature of condemnation, request that this court exercise comity, and assert that this action is barred by Section 27 of the Federal Power Act, the Eleventh Amendment of the United States Constitution, and the status of DWR, OWID and CPUC as agencies of the State of California. Further, OWID and CPUC assert that the FPC has no jurisdiction over the issue of liability.

This is not a dispute in the nature of condemnation. This is a dispute over the obligation of an FPC licensee, OWID, to comply with and assume the economic burden of duties, orders, and regulations imposed by the Federal Power Act and the FPC.

This is not a proper case for the exercise of comity. CPUC has no regulatory authority over OWID, and Water Code Sections 11590–11592 do not purport to accord CPUC such broad regulatory authority over

DWR as to justify the exercise of comity under the holding of *Alabama Public Service Commission* v. *Southern Railway Company,* 341 U.S. 341 (1951).

Section 27 of the Federal Power Act is not relevant to this dispute. This dispute does not involve any interference with a water right or raise any issue over the allocation of waters of the South Fork of the Feather River as between Projects 2100 and 2088.

This type of action is not barred by the Eleventh Amendment. *Alabama Public Service Commission* v. *Southern Railway Company* (supra). Neither is it barred because the parties thereto are state agencies. Section 317 of the Federal Power Act does not exempt from its provisions, either expressly or implicitly, disputes between FPC licensees that are public agencies of the same state.

Whether or not the FPC has authority to determine the issue of liability is not relevant to this dispute. Any authority that does exist is, clearly, held either by the FPC, or the District Court under Section 317 of the Federal Power Act, or both. DWR does not ask this court to determine as between the FPC and the District Court which has partial or complete jurisdiction over the issue of liability. DWR asks only that this court declare that CPUC has no jurisdiction over this issue, or any other issue raised by this dispute. DWR requests this court to direct the District Court to stay proceedings on the issue of liability until the authority of the FPC on this issue has been determined by judicial review.

B. This Dispute Is Erroneously Characterized By Appellees As One In The Nature Of Condemnation; It Is Not; It Is A Dispute Over The Obligation Of OWID As An FPC Licensee To Comply With Duties, Orders, And Regulations Imposed By The Federal Power Act And FPC, And The Authority Of CPUC To Vary Such

OWID endeavors to characterize this dispute as one in the nature of condemnation. It states (OWID 19):

> "Clearly, one whose reservoir impairs or destroys another's property would, under general principles of law, be liable to that person. Section 10(c) simply confirms that this liability survives issuance of the license. See *Ford and Son* v. *Little Falls Fibre Co.,* 280 U.S. 369 (1930).
>
> "That is what OWID is concerned with in the CPUC proceedings."

Based on this characterization OWID urges that CPUC has jurisdiction of this dispute, citing as authority condemnation cases involving issues of compensation (OWID 20) and local policy (OWID 33).

Based on this characterization CPUC blandly asserts (CPUC 5):

> ". . . DWR's action is grounded upon the theory that OWID is seeking enforcement of rights and duties arising under the Federal Power Act. Upon the facts, this is clearly erroneous. The action of OWID, in its application to CPUC, is strictly based upon the Sections 11590–11592 of the California Water Code."

If this is a condemnation dispute it is clear that local statutes, such as Water Code Sections 11590–11592 cannot qualify an FPC licensee's right to bring an ordinary condemnation action in a federal district court pursuant to Section 21 of the Federal Power Act, 16 U.S.C. 814. *Beezer* v. *City of Seattle,* 62 Wash. 2d 569, 383 P.2d 895 (1963); reversed, *City of Seattle* v. *Beezer,* 376 U.S. 224 (1964). However, this is not a condemnation dispute. First, it is a dispute over the obligation of an FPC licensee, OWID, to comply with duties, orders, and regulations imposed by the Federal Power Act and the FPC. Second, it is a dispute over the jurisdiction and authority of a state agency, CPUC, to shift the economic burden of these duties, orders, and regulations to another FPC licensee, DWR. Third, it is a dispute over the jurisdiction and authority of CPUC to determine what modifications, if any, are required to make one FPC licensed project compatible with another.

With respect to the first and second points, above, this dispute is analogous to that involved in *Big Horn Power Co.* v. *State,* 23 Wyo. 271, 148 Pac. 1110 (1915) and the related case of *Clarke, et al* v. *Boysen, et al,* 39 F.2d 800 (C.A. 10th 1930). In the *Big Horn* case the defendant (Big Horn) had been granted a license by the state engineer to construct a dam to a specified height. The dam was constructed higher than licensed and as a result interfered with the plans of the Burlington Railroad to construct a railway in the gorge

behind the dam, the very conflict which the height limitation in Big Horn's license was intended to avoid.

The state successfully prosecuted an action to compel Big Horn to modify the dam. The dam was not modified and in *Clarke, et al* v. *Boysen, et al* the Burlington Railroad sought to quiet Burlington's title to the right-of-way for the railway and to compel Clarke and others, owners of interests in the dam constructed by the Big Horn Power Company, to modify the dam.[1]

Burlington prevailed in the lower court. On appeal, counsel for Clarke sought to characterize the decision of the lower court as authorizing condemnation of land devoted to a public use. The court stated (pp. 815–816):

> "The theory of counsel for Clarke is that the land was already devoted to public use and that the Burlington Company could not condemn such land under its power of eminent domain.
>
> * * * * *
>
> "The right-of-way does not impair the use of the lawful portion of the dam structure and the protection of the Burlington Company's rights and interests therein will in no wise impair or interfere with the use of such lawful portion. *The fact that the protection of the rights and interests of the Burlington Company in such right-of-way will interfere with the maintenance of the unlawful portion of the dam structure, in our opinion, is not material.*" (Emphasis added.)

[1] The decision in the *Clarke* case dealt with several appeals dealing with various issues. Our comments are limited to that portion of the decision dealing with cause No. 1513 which is discussed on pages 813–821 of 39 F.2d.

Counsel for Clarke also sought to invalidate the lower court's decision on the theory of estoppel. The court stated (p. 818):

> "Counsel for the Clarke group further contend that the Burlington Company is estopped to complain of such superstructure and narrow spillway as a nuisance, because the dam and superstructure were constructed and completed before the construction of the railway.
>
> "The Burlington Company's predecessor, the Big Horn Railroad Company, filed its application for its right-of-way in March, 1905. When application was made to the state engineer for the approval of a dam 60 feet in height, the Burlington Company protested and the state engineer limited the height of the dam to 35 feet and approved the plans for a dam 35 feet in height with a spillway 125 feet long. *Under these facts, the Burlington Company clearly had the right to construct its railroad on its right-of-way and to rely upon its right to require the dam to be modified to conform to a lawful structure.*" (Emphasis added.)

The *Big Horn* and *Clarke* cases illustrate that the regulation of OWID by the FPC, and the responsibilities of OWID under the Federal Power Act, do not create a condemnation dispute merely because such regulations and responsibilities might enure to the benefit of DWR. In the court's own words (39 F.2d at page 816):

> "The fact that the protection of the rights and interests of the Burlington Company in such right-of-way will interfere with the maintenance of the unlawful portion of the dam structure, in our opinion, is not material."

Further, these cases illustrate the relevance of the property rights held by DWR in the lands of the United States set aside for DWR's Project 2100. OWID would have this court completely disregard this issue. At page 14 of its brief OWID states:

> ". . . it is clear that if the FPC fails to find violations (as we think it must), DWR's entire argument collapses."

It is, apparently, OWID's position that if OWID did not violate the provisions of the Federal Power Act in the design and construction of the Miners Ranch Canal, DWR has no rights under the Federal Power Act arising from the power withdrawal effected by DWR's license. As noted at page 5 of DWR's opening brief, a portion of the Miners Ranch Canal is located on lands belonging to the United States which were withdrawn and reserved by the United States for DWR's Project 2100 *before* OWID sought licensing for the Miners Ranch Canal. At page 43 of its opening brief DWR emphasized that one of the central issues in this dispute is the rights and obligations that arise from the occupancy of federal lands, an issue over which CPUC, clearly, has no jurisdiction. At page 53 of its opening brief, DWR specifically requested this court to direct the District Court to

proceed to trial, after judicial review of the FPC decision, on the issue raised by paragraph 1e of DWR's prayer for declaratory relief as to DWR's rights in lands belonging to the United States reserved and withdrawn for its Project 2100 (CT 64/5–13).

C. CPUC Has No Comprehensive Regulatory Authority Over OWID Or DWR Justifying The Exercise Of Comity

Reliance is placed by OWID (OWID 30, 32) and CPUC (CPUC 7) on *Alabama Public Service Commission* v. *Southern Railway Company,* 341 U.S. 341 (1951), and *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943). In those cases the Supreme Court emphasized the broad regulatory authority accorded the state commissions by state law, and the availability of judicial review as a matter of right.

As DWR noted in its opening brief (page 36), CPUC has no authority to regulate the design, construction, or operation of OWID's or DWR's projects. Indeed, California statutes will be searched in vain to find any authority in CPUC to regulate any of the activities of OWID or DWR.

OWID's attempt to accord CPUC regulatory authority over OWID (OWID 32, footnote) is sheer sophistry. In *Henderson* v. *Oroville-Wyandotte Irrigation District,* 207 Cal. 215 (1929), cited by OWID, the court expressly recognized that the Railroad Commission, CPUC's predecessor, had no jurisdiction to regulate OWID in the development and operation of its facilities. The court stated (at page 219):

"The further contention of respondent seems to be that inasmuch as the Railroad Commission admittedly is without supervisory power over defendant Irrigation District (*Jochimsen* v. *City of Los Angeles,* 54 Cal.App. 715 [202 Pac. 902]; *City of Pasadena* v. *Railroad Com.,* 183 Cal. 526 [10 A.L.R. 1425, 192 Pac. 25]; *Lindsay-Strathmore Irr. Dist.* v. *Superior Court,* 182 Cal. 315 [187 Pac. 1056]; *Water Users etc. Assn.* v. *Railroad Com.,* 188 Cal. 437 [205 Pac. 682]), ..."

If CPUC had no authority to regulate the facilities of OWID as they existed at that time, 1929, *a fortiori* it has no authority to regulate new facilities constructed 30 years later such as those of OWID's FPC Project 2088. We note that although OWID sets forth (OWID 2) various actions taken by state agencies in connection with the development of FPC Project 2088, no reference is made to any action taken by CPUC. Further, not even CPUC ascribes to itself any regulatory authority over OWID.

The sole authority on which CPUC bases its actions is Water Code Sections 11590–11592. These provisions do not accord CPUC regulatory authority of the type possessed by the state commissions in the *Alabama* and *Burford* cases. It is the FPC which is accorded broad regulatory authority over both OWID and DWR. It is the FPC which has authority to determine which projects are best adapted to a comprehensive plan for the improvement and utilization of waterpower development. It is the FPC which must evaluate the

economic feasibility, including the cost of construction and operation, of each project in relation to the other.

Although CPUC asserts (CPUC 6) that DWR has a right to adequate judicial review pursuant to state law, the fact is DWR has no such right at all, and the only possible review it may have is totally dissimilar to that afforded by the states of Alabama and Texas, discussed in the *Alabama* and *Burford* cases. In California, judicial review of CPUC decisions is subject to discretionary grant or denial and is by certiorari, not by direct appeal as provided by the Alabama and Texas statutes. California Public Utilities Code §§ 1756 and 1759.[2]

Further, the very cases cited by OWID (OWID 24) demonstrate that the California Supreme Court has consistently denied review of CPUC actions under Water Code Sections 11590–11592. *Feather River Railway Co.,* 61 P.U.C. 728 (1963), writ of review denied, August 12, 1964; *County of Butte,* 62 P.U.C. 537 (1964), writ of review denied, March 1965. The adverse effect that such denial would have in the present action before CPUC is discussed at length in DWR's opening brief (DWR 41–43).

We submit that if there was ever a dispute less deserving of the exercise of comity, this is it. Indeed, it is CPUC, not this court, which should be exercising comity rather than doggedly pursuing a parochial policy which can only prolong this litigation and postpone the time when such modifications as may be

[2] These sections are set forth in full in the Appendix.

necessary to the Miners Ranch Canal can be ordered and those orders enforced.

D. Section 27 Of The Federal Power Act Is Not Relevant To The Issues Before This Court

Both OWID (OWID 32) and CPUC (CPUC 5) urge that Section 27 [3] of the Federal Power Act, 16 U.S.C. 821, reserves to CPUC jurisdiction over this dispute. The purpose of Section 27 is to preserve state laws defining proprietary rights in water. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 175–176 (1946). Cf. *Fresno* v. *California,* 372 U.S. 627 (1963). This dispute does not involve any interference with a water right. There is no dispute over the allocation of the waters of the South Fork of the Feather River as between FPC Projects 2100 and 2088.

None of the issues before the FPC involve the resolution of water rights, and, clearly, none of the issues before CPUC involve resolution of such rights either. Further, CPUC has no authority under Water Code Sections 11590–11592 to resolve a water right dispute, even if one existed. Nothing in these sections grants CPUC any authority over the control, appropriation, use, or distribution of water.

The reference to Section 27 is but another example of Appellees' misleading use of a condemnation theory. This dispute does not involve the condemnation of rights in water. Again, it involves the duty of OWID

[3] OWID's reference to Section '28' is, apparently, a typographical error.

to fulfill its obligation under its power license to design, construct, and operate its facilities in accordance with the duties, regulations, and orders imposed by the Federal Power Act and the FPC.

E. This Action Is Not Barred By The Eleventh Amendment Or By The Fact That It Involves A Dispute Between Public Agencies Of The Same State

CPUC asserts that this litigation is barred by the Eleventh Amendment of the United States Constitution (CPUC 7). This assertion is totally without merit. It was rejected by the United States Supreme Court in the very case on which CPUC and OWID base their plea for comity: *Alabama Public Service Commission* v. *Southern Railway Co.,* 341 U.S. 341 (1951). In that case the court states (footnote 4, page 344):

> "Appellants contend for the first time in this Court that a suit to restrain state officials from enforcing unconstitutional state laws is, in effect, a suit against the state prohibited by the Eleventh Amendment. The contention is not tenable in view of the many cases prior to and following *Ex parte Young,* 209 U.S. 123 (1908), in which this Court has granted such relief over the same objection."

OWID states that the Federal Courts *will not* adjudicate interagency disputes between federal agencies and concludes that "*a fortiori* federal courts cannot (and should not) adjudicate disputes between state agencies." (OWID 33–34). On the basis of this conclusion, OWID would, apparently, have this court interpret Section 317 of the Federal Power Act, 16

U.S.C. 825 p, to be inapplicable to disputes between two FPC licensees which are public agencies of the same state.

In support of its conclusion OWID cites two cases: *United States* v. *Easement and Right of Way,* 204 F.Supp. 837 (E.D.Tenn. 1962) and *The Pietro Campanella,* 47 F.Supp. 374 (D.Md. 1942). Neither of these cases involve the Federal Power Act.

In the *United States* case the only authority cited by the court in support of the proposition that resolution of a dispute between two federal agencies is not a judicial function is *United States Department of Agriculture, etc.* v. *Remund,* 330 U.S. 539 (1947).

In the *Remund* case the issue was whether a claim of the Farm Credit Administration had priority under federal law in a state probate proceeding. It was asserted that it did not have such priority because the Farm Credit Administration was an entity separate and distinct from the United States. The court held it was not such a separate entity.

It appears that in *United States* v. *Easement and Right of Way* the court used the *Remund* case only for the proposition that the TVA and FHA were not entities separate and distinct from the United States Government. The court cited no authority for the proposition that these two agencies could not sue one another.

In the *Pietro Campanella* case the issue was whether the Alien Property Custodian should be granted broad authority to represent the owners of two enemy cargo

ships in a libel filed by the United States for the forfeiture of these ships. The court emphasized its belief that an enemy defendant should be permitted to defend his property in court. To reach that result the court found that a suit against the Alien Property Custodian would be a suit against the United States, citing authorities, and concluded that there would thus be no adverse interests involved and the adjudication would be a nullity, citing no authorities.

We believe it incredible that OWID should imply that Section 317 of the Federal Power Act is qualified by these two cases. Further, agencies of the United States have successfully prosecuted actions against one another. In *United States* v. *Interstate Commerce Commission and United States,* 337 U.S. 426 (1949) the Supreme Court held that despite the fact that the United States was both plaintiff and defendant, there was present, as here, an actual case and controversy involving no bad faith or collusion, a case presenting the adversary viewpoints and contentions of actual interested parties. It held that maintenance of the action was not barred by the principle that one may not be both plaintiff and defendant in the same action.

In California there has never been any question that suits may be maintained between state agencies. *People of the State of California* v. *Board of Supervisors of the County of San Luis Obispo,* 50 Cal. 561 (1875); *State of California, by E. P. Calgan, State Controller* v. *County of Sonoma,* 139 Cal. 264 (1903);

County of San Bernardino v. *State Board of Equalization of the State of California and Pacific Fruit Express Company,* 172 Cal. 76 (1916); *State Board of Health of the State of California* v. *County of Alameda,* 42 Cal.App. 166 (1919).

At pages 34 and 35 of its brief OWID states that this court should not interfere with the internal affairs of a public agency created by the state. In support of this proposition it cites *Pennsylvania* v. *Williams,* 294 U.S. 176 (1935), and the unreported case of *State of California* v. *Certain Designated Roads in Butte County, et al,* N.D. Calif. 1964, vacated and dismissed C.A. 9th 1966 (CT/317).

Contrary to OWID's representation, the *State of California* case is not good law. *United States* v. *Munsingwear,* 340 U.S. 36 (1950). In the *Pennsylvania* case the court stated (294 U.S. at page 182):

> "The relief sought, an injunction and the appointment of receivers, was aimed at the prevention of irreparable injury, from the waste of the assets of the insolvent corporation which would ensue from a race of creditors to secure payment of their claims by forced sale of the corporate property. By local statutes elaborate provision is made for accomplishing the same end, through the action of a state officer, in substantially the same manner and without substantially different results from those to be attained in receivership proceedings in the federal courts."

We submit that Water Code sections 11590–11592 are in no way intended to resolve the issues in this

dispute, and the policy set forth in the *Pennsylvania* case is clearly inapplicable. Further, the "internal affairs" to which OWID refers is the accommodation of one FPC licensed project to another. It has been consistently held that the standards and design pursuant to which FPC licensed facilities are authorized, constructed, and operated are not subject to local control. *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320 (1958); *Public Utility District No. 1* v. *Federal Power Commission,* 308 F.2d 318 (1962), cert. denied 372 U.S. 908 (1963).

F. The Absence Of Any Authority In The FPC To Determine Issues Of Liability Confers No Authority On CPUC Over These Issues

At page 20 of its brief OWID urges that the FPC has no authority to determine questions of liability of FPC licensees. It is, apparently, OWID's position that in the absence of such authority, there can be no conflict between Water Code Sections 11590–11592 and the Federal Power Act. This is also the position of CPUC, for its states (CPUC 4):

> "DWR relies upon the Federal Power Act to invoke federal jurisdiction. But the Federal Power Act does not create or eliminate liability nor does it prescribe a forum for adjudication of liability; it merely preserves existing remedies against licensees."

The issue of liability is twofold. There is the issue of OWID's liability to comply with the regulations and orders of the FPC, and there is the issue of

DWR's liability under the Federal Power Act for the cost of OWID's compliance with the orders and regulations of the FPC. Section 317 of the Federal Power Act, which OWID totally and CPUC virtually ignore, does not distinguish between these two types of liability but states simply:

> "The District Courts of the United States . . . shall have exclusive jurisdiction of . . . all suits in equity and actions at law brought to enforce any liability or duty created by . . . the Act . . . ."

It is clear that if the FPC has no authority to determine either of the above issues of liability, that authority is vested exclusively in the District Court, not CPUC. For this reason the FPC's authority over the issue of liability is completely irrelevant to the issues before this court under this appeal.

DWR has not requested that this court determine as between the FPC and the District Court which should determine the issue or issues of liability. DWR specifically requested that this court direct the District Court to stay proceedings on the issues of liability until the FPC has acted, and its authority as to these issues tested by judicial review. We submit that this procedure is orderly, protects both the rights of OWID and DWR, and permits resolution of all issues raised in this dispute.

III

CONCLUSION

For the reasons stated herein, and in DWR's opening brief, DWR submits that this court should grant the relief requested in Section V of its opening brief (pages 53–54).

Dated: May 7, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD D. MARTLAND
Deputy Attorney General

APPENDIX

Statutes of the State of California

Public Utilities Code Section 1756:

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

Public Utilities Code Section 1759:

"No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

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